

DONNA S. TAMANAHA (WI SBN 1013199)
Assistant United States Trustee
LYNETTE C. KELLY (SBN 120799)
Trial Attorney
MARTA E. VILLACORTA (NY SBN 4918280)
Trial Attorney
United States Department of Justice
Office of the U.S. Trustee
450 Golden Gate Avenue, Suite 05-0153
San Francisco, CA 94102
Telephone: (415) 705-3333
Facsimile: (415) 705-3379
Email: lynette.c.kelly@usdoj.gov;
marta.villacorta@usdoj.gov

Attorneys for James L. Snyder,
Acting United States Trustee for Region 12¹

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re)	Case No. 19-30088 DM
)	
PG&E CORPORATION,)	Chapter 11
)	
Debtor-in-Possession.)	

In re)	Case No. 19-30089 DM
)	
PACIFIC GAS AND ELECTRIC COMPANY,)	Chapter 11
)	
Debtor-in-Possession.)	

**OBJECTION OF THE UNITED STATES TRUSTEE TO
DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS AUTHORIZING
DEBTOR IN POSSESSION FINANCING**

The Acting United States Trustee for Region 12 (the "United States Trustee") hereby files this preliminary objection (the "Objection") to the *Motion of Debtors Pursuant to 11 U.S.C. §§ 105, 362, 363, 364, 503 and 507, and Fed. R. Bankr. P. 2002, 4001, 6003, 6004 and 9014 for Interim and Final Orders (I) Authorizing the Debtors to Obtain Senior Secured, Superpriority,*

¹James L. Snyder, Acting United States Trustee for Region 12, is acting in this appointment for Tracy Hope Davis, United States Trustee for Region 17, who has recused herself.

1 *Postpetition Financing, (II) Granting Liens and Superpriority Claims, (III) Modifying the*
2 *Automatic Stay, (IV) Scheduling Final Hearing and (V) Granting Related Relief* (ECF No. 23) (the
3 “DIP Financing Motion”). In support of the Objection, the United States Trustee respectfully
4 states as follows:
5

6 **I. INTRODUCTION**

7 The Debtors have not demonstrated that certain provisions in the proposed financing
8 should be approved at this early stage of the case. It is unclear whether the \$1.5 billion which the
9 Debtors propose to borrow on an interim basis is necessary to avoid immediate and irreparable
10 harm in accordance with Fed. R. Bankr. R. 4001. In addition, the proposed transaction fees
11 include fees set forth in fee letters that have been filed under seal. Moreover, the proposed Interim
12 Order contains a premature good faith finding under Section 364(e).
13

14 **II. FACTUAL BACKGROUND**

15 1. On January 29, 2019 (the “Petition Date”), the Debtors filed voluntary petitions for
16 relief under Chapter 11 of the Bankruptcy Code.
17

18 2. The Debtors have not filed the required Schedules and Statements. The Debtors
19 have instead filed an application to extend their deadline to do so by 60 days. *See* ECF No. 18. If
20 granted, the request would allow the Debtors a total of 74 days after the Petition Date to file their
21 Schedules and Statements.
22

23 3. Although the United States Trustee has not had sufficient time to appoint an
24 Official Committee of Unsecured Creditors, a formation meeting will be held on February 11, 2019.

25 4. On the Petition Date, the Debtors filed the DIP Financing Motion. As set forth in
26 the DIP Financing Motion, the Debtors seek authorization to borrow \$5.5 billion on a secured,
27 superpriority basis. On an interim basis, the Debtors seek authorization to borrow \$1.5 billion. *See*
28

1 DIP Financing Motion, at p. 2 of 42.²

2 5. As part of the credit agreement filed as Exhibit B to the DIP Financing Motion
3 (ECF No. 23-2) (the “DIP Credit Agreement”), the Debtors have agreed to pay fees to the DIP
4 Lenders and/or the DIP Agents: (i) a fee for unused availability under the “Revolving Credit
5 Facility”; (ii) a fee for undrawn “Delayed Draw Term Loans”; (iii) a fronting fee for outstanding
6 letters of credit; (iv) a letter of credit participation fee; and (v) an extension fee. *See* DIP Financing
7 Motion, at p.18 of 42; DIP Credit Agreement, at §§ 2.4, 2.5, 3.3.
8

9 6. The Debtors also seek authorization to pay fees set forth in certain fee letters they
10 seek to keep confidential by filing a seal motion (ECF No. 25).³ *See* DIP Financing Motion, at
11 p.18 of 42; *see also* proposed Interim Order on DIP Financing Motion (ECF No. 23-1) (the
12 “Proposed Interim Order”), at p.12 of 37.
13

14 **III. OBJECTION**

15 Before approving debtor in possession financing, a court must consider whether the terms
16 of proposed financing are fair, reasonable and adequate. *See In re Los Angeles Dodgers LLC*, 457
17 B.R. 308, 312-13 (Bankr. D. Del. 2011) (citing *In re Crouse Group, Inc.*, 71 B.R. 544, 546 (Bankr.
18 E.D. Pa. 1987)). In this respect, courts routinely consider the following factors: (i) whether the
19 proposed facility is an exercise of the debtor’s reasonable business judgment; (ii) whether the
20 proposed facility is in the best interests of both the estate and its creditors; (iii) whether the
21 transaction is both (a) necessary to preserve estate assets and (b) necessary and essential for the
22 continued operation of the debtor’s business; (iv) whether the terms of the proposed transaction are
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27 ² Debtor Pacific Gas and Electric Company (the “Utility”) is the borrower, while Debtor PG&E Corporation
is the guarantor. *See* DIP Financing Motion, at pp. 2, 9, 11 of 42.

28 ³ Contemporaneously herewith, the United States Trustee is filing an objection to the motion to seal.

1 fair and reasonable given the circumstances; and (v) whether the proposed facility was negotiated
2 in good faith and at arm's length. *See In re Farmland Indus., Inc.*, 294 B.R. 855, 881 (Bankr.
3 W.D. Mo. 2003).

4 Courts recognize that debtors in possession often “enjoy little negotiating power.” *See In*
5 *re Defender Drug Stores, Inc.*, 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992). Thus, bankruptcy courts
6 have not approved financing arrangements that convert the bankruptcy process from one designed
7 to benefit all creditors to one designed for the sole (or primary) benefit of a post-petition lender
8 *See, e.g., Ames Dep’t Stores, Inc.*, 115 B.R. 34, 38-39 (Bankr. S.D.N.Y. 1990) (citing *In re Tenney*
9 *Vill. Co.*, 104 B.R. 562, 568 (Bankr. D.N.H. 1989) (holding that the terms of a post-petition
10 financing facility must not “pervert the reorganizational process from one designed to
11 accommodate all classes of creditors . . . to one specially crafted for the benefit” of one creditor)).
12 Moreover, at an interim hearing on less than 14 days’ notice, a court “may authorize the obtaining
13 of credit only to the extent necessary to avoid immediate and irreparable harm to the estate
14 pending a final hearing.” *See* Fed. R. Bankr. P. 4001(c)(2) (emphasis added).

15 Here, the proposed DIP financing has a number of provisions that should not be approved
16 on shortened notice, if at all.

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18
19
20 **A. The Debtors Have Not Demonstrated the Need to Borrow \$1.5 Billion on an Interim**
21 **Basis.**

22 As noted above, at an interim hearing, the authorization to obtain credit must be limited to
23 what is necessary to avoid immediate and irreparable harm. *See* Fed. R. Bankr. P. 4001(c)(2).

24 Here, the Debtors seek authorization to borrow up to \$1.5 billion. *See* ¶ 7, *supra*. That
25 figure, however, assumes that a final hearing on the DIP Financing Motion will not occur until
26 April 15, 2019. *See* DIP Financing Motion, at p. 31 of 42. A final hearing date in February is
27 much more likely. According to the Debtors’ 13-week budget, if the final hearing were to occur
28

1 on or about February 23, 2019, the Debtors would need to borrow only \$750 million. *See* 13-week
2 budget (ECF No. 23-3), at p.2. Moreover, at least one expenditures on the 13-week budget may
3 not be immediately necessary. Specifically, Week 1 of the 13-week budget reflects a debt service
4 payment of \$57,950,000. *See id.* At any rate, the 13-week budget indicates that the Debtors would
5 have an ending cash balance of approximately \$1.6 billion on February 23, 2019. Even if this
6 figure is reduced by \$700 million for budgeted customer deposits and a working capital reserve,
7 the Utility may not need to borrow money before a final hearing.
8

9 **B. Parties and Interest Cannot Assess Whether the DIP Financing Fees are a Reasonable**
10 **Exercise of the Debtors' Business Judgment.**

11 A court's "discretion to authorize incentives to postpetition lenders is not unfettered." *See*
12 *In re Defender Drug Stores, Inc.*, 145 B.R. at 317. Here, the Debtors seek authorization to pay a
13 number of fees to the DIP Lenders and/or the DIP Agents, including the fees in the fee letters. As
14 discussed above, the fee letters have been filed under seal. *See* ¶¶ 8-10, *supra*. These fees should
15 not be approved unless they are made available to parties in interest, including any Official
16 Committees (when formed).
17

18 **C. The Court Should Not Make a Good Faith Finding at a First Day Hearing without**
19 **Input from an Official Committee.**

20 The Debtors seek a Section 364(e) finding. *See* DIP Financing Motion, at p. 38 of 42;
21 Proposed Interim Order (ECF No. 23-1), at Findings I and J and ¶ 16 (pp. 9, 10, 25 of 37). Such a
22 finding would all but immunize the DIP financing from appellate review. *See* 11 U.S.C. § 364(e);
23 *In re Adams Apple, Inc.*, 829 F.2d 1484, 1488-89, 1491 & n.6 (9th Cir. 1987) (dismissing appeal of
24 approval of cross-collateralization clause as moot pursuant to Section 364(e)). This sweeping
25 relief should not be granted at the outset of the case, before an Official Committee of Unsecured
26 Creditors has had the opportunity to consider the issue.
27
28

1 **D. The Court Should Not Approve a Lien on Avoidance Actions.**

2 As part of the DIP financing, the Debtors seek to grant the DIP Lenders and/or the DIP
3 Agents a lien on causes of action under Chapter 5 of the Bankruptcy Code (“Avoidance Actions”).
4 See Proposed Interim Order, at ¶ 3 (p.14 of 37); *see also* DIP Financing Motion, at p. 21 of 42.⁴
5 The Avoidance Actions should be maintained for the benefit of unsecured creditors. *Cf. Buncher*
6 *Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV*, 229 F.3d 245, 250 (3d
7 Cir. 2000) (“When recovery is sought under section 544(b) of the Bankruptcy Code, any recovery
8 is for the benefit of all unsecured creditors”); *see also* Court’s *Guidelines for Cash Collateral*
9 *and Financing Stipulations*, at ¶ E.7.
10

11 **E. The Court Should Not Approve Waivers regarding Section 506(c) and Marshalling.**

12 The relief requested in the DIP Financing Motion includes waivers of the Debtors’ rights
13 under section 506(c) and marshalling. See DIP Financing Motion, at p. 22 of 42; Interim Order, at
14 ¶¶ 23-24 (pp. 26-27 of 37). These waivers should not be approved at this stage of the case. See
15 Court’s *Guidelines for Cash Collateral and Financing Stipulations*, at ¶ E.4.
16

17 **F. The Court Should Not Approve Financing Terms that Divest the Debtors of**
18 **Discretion in Formulating a Plan and Administration of the Case.**

19 Events of default under the DIP Credit Agreement include the Debtors’ filing of (i)
20 a plan that is not an “Acceptable Plan”⁵ or (ii) a motion to dismiss or convert the case or for
21

22
23 ⁴ This relief would be “subject to the approval of the Court in the Final Order.” See Interim Order, at ¶ 3
(p.14 of 37).

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25 ⁵ An “Acceptable Plan” is defined as “a Chapter 11 Plan that, unless otherwise consented to in advance in
26 writing by the Administrative Agent, provides for the termination of the Commitments, the indefeasible
27 payment in full in cash of the Obligations (other than contingent Obligations not yet due and payable) and
28 the expiration or termination of all outstanding Letters of Credit (or, with respect to any undrawn Letters of
Credit, the establishment of a “backstop” letter of credit or other Cash Collateralization thereof as required
herein), in each case on the effective date of such Chapter 11 Plan in accordance with the terms of this
Agreement.” See DIP Credit Agreement, at § 1.1 (p. 9 of 113).

1 the appointment of a trustee. *See* DIP Credit Agreement, at § 8(i), (n) (at pp. 79, 81 of
2 113). These provisions may improperly divest the Debtors of discretion in formulating a
3 plan and the administration of the case and should not be approved. *See* Court's *Guidelines*
4 *for Cash Collateral and Financing Stipulations*, at ¶ E.5.

5
6 **G. Findings of Fact and Limitations of Liability Should be Subject to Review at the**
7 **Final Hearing**

8 The Proposed Interim Order contains extensive findings of fact, as well as a
9 limitation of liability. *See, e.g.*, Proposed Interim Order, at Findings F, G, and H and ¶ 32.
10 Given the limited record before the Court and the short notice, any such findings and
11 limitations should be subject to review at the final hearing.

12 **IV. RESERVATION OF RIGHTS**

13 The United States Trustee reserves his right to supplement this Objection on any
14 and all grounds prior to the final hearing on the DIP Financing Motion.

15
16 **V. CONCLUSION**

17 WHEREFORE, the United States Trustee requests that the DIP Financing Motion in its
18 current form be denied, and for such other and further relief as the Court deems just and proper.
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21 Dated: January 31, 2019

James L. Snyder
Acting United States Trustee, Region 12

23 /s/ Lynette C. Kelly
24 Trial Attorney